IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.69 OF 1995.

1. Smt.Madhuribai Shankar Salve

2. Shri Kunal Shankar Salve

3. Shri Chandramani Shankar Salve .. Appellants
(Original Defendants)

vs.

1. Shri Murlidhar Bhimaji Kale

2. Shri Bhausaheb Shankar Kale
(nos.1 and 2 dismissed vide order dt.30.8.1996)

3. Shri Pulkeshi Shankar Salve

4. Shri Ratnaraj Shankar Salve

5. Shri Vishwajit Shankar Salve
.. Respondents.
(Original Plaintiffs)

Shri K.K.Tated, Advocate for the Appellant.

Mr.Anil Kumar Patil, Advocate for the Respondent.

WITH

SECOND APPEAL NO. 70 OF 1995

1. Madhuribai Shankar Salve

2. Kunal Shankar Salve

3. Chandrakant Shankar Salve

4. Ratnaraj Shankar Salve

5. Vishwajit Shankar Salve

vs.

1. Murlidhar Bhimaji Kale

2. Bhausaheb Kale

3. Smt. Thakubai Shankar Kale

Shri K.K.Tated, Advocate for Appellants

Shri R.A.Thorat, Advocate for Respondents.

CORAM : S.R.SATHE, J.

DATED : 8TH SEPTEMBER, 2004.

JUDGMENT :

1. Appellants, the original defendants in Regular Civil Suit No. 73 of 1990 and original plaintiffs in Regular Civil Suit No.87 of 1980 have preferred this second appeal against the common judgment and order passed by the Court of 2nd Additional District Judge, Nasik in Civil Appeal No.322 of 1989, whereby both the appeals were partly allowed and suit for specific performance filed by the Original Plaintiff i.e. Regular Civil Suit No. 73 of 1980 was partly decreed and decree for possesion was passed against original defendants 1 to 3. As the original defendants are the appellants and

original plaintiffs are the respondents in both matters, for the sake of convenience hereafter the parties shall be referred to as appellant/defendants and respondent/plaintiffs.

2. The brief facts giving rise to these two appeals are as under :

. The suit property bearing block no.243 admeasuring 3 Hectors 80 Ares, situated at village Jalgaon, Tal : Niphad, District:Nasik was initially owned by one Gangubai Salve, the mother of Shankar Salve, the father of Defendant no.2 to 6 and husband of defendant no.1. Gangubai died in the year 1966. After her death, her son Shankar Salve became the owner of the said property. He also died in the year 1966, living behind defendants 1 to 6 as only legal heirs. According to Respondents/plaintiffs after the death of Shankar Salve, his family i.e. defendants 1 to 6 was facing financial difficulties. Defendants 2 to 6 were minors. Defendant no.1, the mother of Defendant nos. 2 o 6 was managing the joint family. The plaintiff/respondents were having

their agricultural land adjacent to the defendants land. As the Defendants/appellants were in need of money to meet educational expenses and there was legal necessity, the Defendant no.1 decided to sell the suit property to Respondent/plaintiffs for consideration of Rs.19,000/- and accordingly agreement to sale was executed on 13.4.1968. By accepting earnest amount of Rs.5000/-. Infact, prior to that on 7.4.1968, the Defendant no.1 had taken amount of Rs.5000/- from the Plaintiff. She also acknowledged the said amount in the agreement to sale. It was decided to execute the sale deed after five years and before completion of the six years of agreement to sale. Respondents/plaintiffs were put in possesion of the suit property and it was agreed that defendants/appellants would obtain necessary permission from the consolidation authorities and would execute the sale deed. After the execution of such agreement the defendant no.1 again took an amount of Rs.2200/- and Rs.500/- on 13.7.1970 and 7.8.1970 respectively from the Respondent/plaintiffs and accordingly necessary endorsement was made in the agreement to sale. On

25.8.1973 the plaintiff issued notice to the Defendant/appellants and called upon them to execute the sale deed after accepting the balance amount of consideration. Inspite of the said notice, the defendants did not execute the sale ded, but on the contrary on 28.3.1974 the period of execution of sale deed was extended for further seven years. On 2,8,1974 the defendant no.1 accepted the amount of Rs.1300/- from the plaintiffs and then again on 12.7.1975 she accepted amount of Rs.500/- from the plaintiffs. Thereafter, on 30.7.1978 defendants issued notice to the plaintiffs and called upon them to get the sale deed eexcuted. Thereupon the respondent/plaintiffs gave notice to the defendants and caled upon them to execute the sale deed. Inspite of the receipt of the notice the defendants did not take any action. Hence, on 25.3.1980 the plaintiffs filed Regular Civil Suit No.73 of 1980 against the defendants for specific performance of agreement to sale and also averred in the plaint that in case the defendants fail to execute the sale deed, the same be executed through the Commissioner.

3. The Defendant no.1 filed her written statement at exhibit 16 in Regular Civil Suit No.73 of 1980 and opposed the plaintiffs claim for specific performance. She contended that defendants 1 to 6 were not at all in need of money and there was no legal necessity to sell the suit property nor there was any intention of the defendants to sell the suit property. According to her after the death of Shankar Salve, there was nobody to look after her and taking undue advantage of her condition the plaintiff cheated her. They told her that they would help her in getting her name entered and to improve the suit land. On making such representations, the plaintiff obtained her signature on some documents. She, however contended that she has never executed any agreement to sale as alleged by the plaintiff. The Defendant no.1 further contended that plaintiff forcibly dispossessed her and as such plaintiff is not entitled to get any relief. Besides this, she contended that when the alleged agreement was executed defendants 2 to 6 were minors. No prior permission was obtained

from the District Court for sale of minors property and as such the alleged agreement is void. She also denied the plaintiffs case that she had received amount of Rs.2200/- and Rs.500/- on 13.7.1970 and 7.8.1970 respectively. She further contended that the suit is not in time. Hence, on all these grounds the defendant no.1 prayed for dismissal of the suit.

4. The defendants 2 to 6 filed their written statement at exhibit 44 and raised similar contentions. They also contended that there was no need for the defendant no.1 to enter into the alleged agreement to sale and that document in question was got executed by the plaintiffs by undue influence and coercion and same is not binding on them. They also contended that alleged transaction was not for legal necessity for benefit of estate and it was never in the interest of the minors. The defendants 2 to 6 also therefore prayed for dismissal of the suit. On these pleadings the learned trial judge framed issues at exhibit 18. The defendants 1 to 6 also filed seperate suit for recovery of possesion i.e.

Regular Civil Suit No.87 of 1980 on the grounds mentioned by them in their written statement exhibit 16 and exhibit 44 filed in Regular Civil Suit No.73 of 1980. In that suit the original plaintiffs in Suit No.73 of 1980 filed their written statement and made out the same case. They contended that the family of defendants 1 to 6 was in need of money. There was legal necessity to sell the property. The transaction was in the interest of the minor and for benefit of estate and as such defendant no.1 executed the agreement to sale and plaintiffs are put in possesion. They, therefore, contended that they are entitle for specific performance and suit filed by defendants for possession is liable to be dismissed.

5. Both the parties decided to adduce oral and documentary evidence in Regular Civil Suit No.33 of 1980 and to read the said evidence in other suit i.e. Regular Civil Suit No. 87 of 1980. Accordingly, the evidence was adduced by both the parties. After considering the said evidence the trial court passed seperate

judgements in both the above mentioned suits. The plaintiffs suit for specific performance i.e. Regular Civil Suit No.73 of 1980 was decreed in plaintiffs favour, while the suit for possession i.e. Regular Civil Suit no. 87 of 1980 filed by the vendor was dismissed. Being aggrieved by the said orders, the original defendants in Regular Civil Suit No.73 of 1980 filed two seperate Civil Appeals i.e. Civil Appeal No.319 of 1989 and Civil Appeal No.322 of 1989. Both these appeals were heard together by the first appellate court and the first appellate court found that the transaction in question was of agreement to sale. There was no substance in the contention of the deefendants that there was no legal necessity or the document was got executed by fraud and undue influence. The first appellate court, however, noticed that the transaction was not in the interest of the minors 4 to 6 and as such the agreement to sale in question is not binding on them. The appellate court further held that so far as the case of defendants 2 and 3 is concerned, they had become major in the year 1973 and thereafter they did not file any suit for

declaration within three years, nor they filed the suit for possession within that period. Hence the agreement can not be refuted by them. As a result of this, the first appellate court partly allowed both the appeals and directed the defendants 1 to 3 to execute the sale deed of the suit property to the extent of half share in the suit property and directed plaintiffs to hand over the possession of the half portion of the suit land to defendants 4 to 6. The above mentioned orders of the first appellate court are challenged in the present appeals. At the time of admission this Court passed the following order "Admit. Ground nos.1, 3, 5 and 9 are substantial question of law". The said grounds are as under :

> "1 Whether the Lower Appellate Court having held that at the time when the agreement was executed and the contract was entered into, there was no legal necessity and that Appellant No.1 had no authority to enter into an agreement, the learned Judge erroneously further held that the Respondents 1 and 2 are entitled

to the decree of specific performance to the extent of 1/2 share.

2. .....

3. Whether the Lower Appellate Court was justified in holding that th Appellants should execute the sale deed of the agreement which was executed Appellants 2 and 3 were minors and admittedly when permission under section 8 of the Hindu Minority & Guardianship Act was not obtained.

4. ....

5. The lower appellate court ought to have been held that the following facts would clearly show that the agreement was not to be acted upon and was a sham document.

6. ....

7. .....

8. .....

9. The interpretation putforth by the learned Judge in respect of the provisions of limitation Act is totally unfounded."

6. As the claim for specific performance against original defendants 4 to 6 was rejected by the appellate court, the plaintiff filed cross objection and contended that the order passed by the first appellate court refusing to grant specific performance against the original defendants 4 to 6 is not legal and correct and therefore prayed for setting aside the said order.

7. In this appeal before me Shri Tated, the learned Advocate for the appellant/defendants argued before me that the learned lower court ought to have held that the agreement in question exhibit 66 is sham and bogus and the real transaction between the parties was not at all of agreement to sale. In order to substantiate his

proposition, he has drawn my attention to various circumstances. Firstly, he submitted that from the evidence on record it appears that the land in question is a very fertile irrigated land and considering the said aspect the price of Rs.2000/- per acre which is agreed between the parties appears to be grossly inadequate. However, it is to be mentioned that though in the written statement the defendants have contended that the value of the said property may be worth Rs.1,00,000/- we find that the defendants have not adduced any cogent and convincing evidence so as to come to the conclusion that the consideration price agreed was grossly inadequate. Infact, the defendants could have produced the sale deeds of the nearly lands and could have examined some witneses to prove the prices of the lands in that locality during the period 1968, but no such attempt has been made by the defendants. So the price of Rs.19,000/- in the year 1968 in respect of 3 Hectares and 80 Ares land can not be said to be inadequate.

8. Secondly, it was tried to be shown that

the transaction was not of sale, and the sale deed was not to be exexuted at any time. The period of execution of the sale deed was fixed for five years and subsequently the same was again extended. Certainly, this is the circumstance which creates some doubt about the real nature of the transaction. However, at the same time it must be noted that the defendant no.1 has not specifically stated that as it was never intention of the parties to enter into the transaction of sale, deliberately such long period was mentioned and it was shown accordingly only with a view to facilitate the defendant in the meantime to over come her financial difficulties and return the said amount. So, in the absence of any substantial evidence in that behalf mrely because the period mentioned is of long duration and again it was extended, one cant jump to the conclusion that the defendant no.1 had never intended to execute the sale deed. We can not ignore the fact that the defendant no.1 is an educated lady. She was managing the affairs of the family, whenever she was in need of money she has taken the money from the plaintiffs and thereafter acknowledged

the same by making necessary endorsement in the original agreement exhibit 66. All these subsequent endorsements are in her handwriting. Though the contention is taken by the defendants that the transaction in question was got executed by deception or undue influence and fraud the defendant no.1 has not at all adduced any evidence worth the name to show that she has discharged the burden satisfactorily. On the contrary, it has come on record that whenever the defendant no.1 took money and thereafter extended the time or acknowledged the payment and made endorsement on the document exhibit 66, every time her near relatives were present. After taking into consideration the entire evidence in this respect, both the courts below have recorded the finding of fact that the transaction dated 13.4.1968 vide exhibit 66 was of an agreement to sale. As such there is no reason to interfere with the said finding.

9. The learned Advocate for the appellant canvassed before me that the first appellate court ought to have held that plaintiff had failed to

aver and prove that plaintiffs were and are ready and willing to perform their part of the contract and as such there was no proper compliance of section 16(1)(c) of the Specific Relief Act. Firstly, it must be noted that both the courts below have held that plaintiffs have proved that they were and are ready and willing to perform their part of the contract. Admitedly, out of Rs.19,000/-, Rs.14,500/- have already been paid by the plaintiffs to the defendants. So substantial amount of the consideration has already been paid. So, under such circumstances, it is very difficult to believe that plaintiffs were and are not ready and willing to perform their part of the contract, It is well settled that in order to prove the rediness and willingness, it is not necessary for the plaintiffs to specifically use the words ‘readiness and willingness’ in the plaint. Ultimately, whether in a given case the plaintiffs were ready and willing to perform their part of contract is to be considered from all the facts and circumstances of the case. In the instant case, admittedly, the possession of the said land was given by the defendants to plaintiffs under an

agreement to sale. Thereafter plaintiffs had also issued notce dated 25.8.1973 exhibit 53 and called upon the defendants to execute the sale deed. So it does appear that both the courts below have taken into consideration all these facts and circumstances and considering the conduct of the parties they have held that plaintiffs have proved that they were and are willing to perform their part of the contract. The learned advocate for the respondent Shri Thorat argued before me that whether plaintiffs were ready and willing to pefform their part of the contract is infact not the substantial question of law and as such the same can not be agitated by the appellants/ defendants. For this proposition he has placed reliance on a case Veerayee Ammal vs. Seemi Ammal AIR 2001 SC 2920, wherein the Apex Court has specifically observed that whether plaintiff was ready and willing to perform his part of the contract is an issue of fact, concurrent findings of facts arrived at by the courts below of said issue can not be interfered and such issue is not the substantial question of law. It is therefore, clear that there is no substance in the agrument

advanced by the learned Advocate for the appellant/defendant in this behalf.

10. It is an admitted fact that the property in question was owned by the father of defendants 2 to 6 and husband of defendant no.1 and as such all the defendants are having equal share in the same. It is also not in dispute that agreement in question exhibit 66 has been executed only by defendant no.1. It is very clear that at the relevant time she was natural and legal guardian of the defendants 2 to 6. So, it was within her power to enter into an agreement to sale provided such agreement was necessary for legal necessity and was for the benefit of the estate and in the interest of the minors. The first appellate court has specifically recorded fining of fact that the transaction in question was not for legal necessity and it was also not for the benefit of estate. It has been also observed by the first appellate court that taking into consideration the alleged need by the familty at the relevant time also it can not be said that the transaction was in the interest of minors. Infact, as a result of

the same the first appellate court came to the conclusion that the said transaction would not bind the interest of the minors 4 to 6. The said finding is legal and correct. There is no necessity to interfere with the same. The main question is what about the defendants 2 and 3, because they have admittedly become major during the subsistence of this agreement in the year 1973 or thereabout. It appears that the first appellate court has observed that the defendants 2 and 3 did not raise any objection and rebut the contract within a period of three years from the time they became major and as such their suit for possession was barred by Article 60 of the Limitation Act. However, the learned Advocate for the Defendants/appellants submitted that Article 60 is not applicable in the instant case and on the contrary Article 65 is applicable. I think that there is no susbtance in the objection raised by the appellants/defendants in this behalf. Article 60 of the Limitation Act lays down the period of limiation. As per the said article limitation to set aside a transfer of property made by the guardian of ward

(a) by the ward who has attained majority is 3 years, when the ward attains majority.

(b)by the wards legal representatives is 3 years when the ward attains majority"

However, firstly it must be noted that the agreement in question is only the agreement to sell and it is not the sale deed so it is infact not the case of transaction as contemplated under Article 60 of the Limitation Act. The agreement to sale though accompanied with the possesion does not amount to transfer within the meaning of this article i.e. Article 60. So, I have no hesitation to hold that article 60 is not applicable. Moreover, once it is said that the agreement entered into by the defendant no.1, who was the minors guardian at the relevant time was not for legal necessity and benefit of estate and no consent was also obtained from the district court for entering into such transaction, the said transaction is not legal and correct and it will

not bind the interest of the minors. So, the contract which is otherwise not legal and correct initially, cannot be made enforceable merely because of the fact that the defendants 2 and 3 did not object for the same after they became major. So, I think that the finding recorded by the appellate court to the effect that the transaction in question is binding on the defendants 2 and 3 and as such their suit for possession is also time barred is not legal and correct. So it is infact necessary to hold that the agreement in question is not at all binding on the heirs i.e. defendants 2 to 6.

11. The learned Advocate for the appellant/defendants strenously argued before me that in the instant case when it appears that the defendants 2 to 6 are together having 2/6th share and the transaction is not binding to that extent, it was not proper on the part of the first appellate court to pass a decree for specific performance. According to him having regard to the provisions of section 12 and 20 of the Specific Relief Act, at the most the appellate

court should have granted decree for refund of earnest money but no decree for specific performance should have granted. It is true that there is some substance in the argument advanced by the learned Advocate for the defendants in this behalf. Normally having held that the transaction in question does not bind the share to the extent of 5/6th share , I would have passed the order regarding refund of earnest money. However, while considering this aspect we also cannot ignore the fact that the initial agreement is of the year 1968. The substantial amount of consideration is already paid. Not only that but right from the year 1968 till today, the plaintiffs are in possession of the said land. They have made lot of improvement in the said land. So, in such circumstances, there is no reason why the plaintiff should be deprived of the property, to which extent they are entitled i.e. the share of the defendant no.1. The defendant no.1 is having 1/6th share in the suit property. So, atleast to that extent she can be asked to execute the sale deed so that equities can be met to some extent.

. In this view of the matter Second Appeal No.69 of 1995 is partly allowed.

. The order passed by First Appellate Court in Civil Appeal No.319 of 1989 is modified and it is ordered that the plaintiffs are entitled for specific performance of agreement to sale to the extent of 1/6th share belonging to appellant/defendant no.1. The defendant no.1 to execute sale deed to that extent in favour of the plaintiffs. The claim for specific performance of the agreement to sale againt appellant/defendant 2 to 6 is rejected.

. Second Appeal No.70/1995 is also partly allowed. The order pased by the first appellate court in Civil Appeal No.322 is modified. It is hereby directed that respondents/plaintiffs shall hand over 5/6th share out of the suit land to appellants/defendants 2 to 6 within three months from the date of this order.

. Cross objections filed by plaintiffs are dismissed.

. Under the perucliar circumstances of the case parties to bear their own cost.

. At this stage Shri Tated, learned Advocate for the appellants/original defendants submitted that by virtue of the order passed by this Court Coram : D.G.Deshmukh, J on 7.3.2000, the original plaintiffs were directed to deposit the amount of Rs.45,000/- per year with a view to protect the interest of the minors. Accordingly the plaintiffs have deposited the amount for one year and the same be now returned to the original defendants 4 to 6. The learned advocate for the original plaintiff Shri V.A.Thorat is absent. Considering the final ordr passed in this appeal, I think that there is substance in the submission made by the learned advocate for the original defendants and hence the trial court is directed to pay the amount of Rs.45,000/- together with interest accrued to the original defendants 4 to 6, as now they have become major.